

AMERICAN ARBITRATION ASSOCIATION  
SAMANTHA E. TOWER, ESQ., ARBITRATOR

<u>Fraternal Order of Police,</u>	*	AAA Case No.
<u>Lodge #5</u>	*	
	*	01-16-0000-6567
	*	
<u>Union</u>	*	Melville Jones
	*	Discipline
	*	
AND	*	
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<u>City of Philadelphia</u>	*	
	*	
	*	
<u>Employer</u>	*	

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On Behalf of the Union: Marc L. Gelman, Esq.

On Behalf of the Employer: Duncan M. Lloyd, Esq.

OPINION AND AWARD

Date of Hearing: February 23, 2017

Date of Award: April 14, 2017

## BACKGROUND

The City of Philadelphia (City) suspended Melville Jones (Grievant) for three days for his alleged conduct on September 3, 2014. The Fraternal Order of Police, Lodge #5 (Union) filed this grievance on December 9, 2015 challenging Grievant's suspension. This grievance arose under the collective bargaining agreement (CBA) which is in effect from July 1, 2014 to June 30, 2017. A hearing on this matter was held on April 27, 2016.

Grievant is a Police Officer who has been employed by the City for approximately 17 years. At the time of the discipline Grievant was assigned to the 24<sup>th</sup> District in charge of processing 48As.<sup>1</sup>

Grievant received the following notice of suspension for violating the Disciplinary Code:

CONDUCT UNBECOMING, Section 1-\$016-10: (Inappropriate language conduct or gestures to Police Department employees while on duty)

On September 3, 2014, Lieutenant K [REDACTED] was informed that the 24<sup>th</sup> District needed an officer to work the

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<sup>1</sup> Grievant testified that a 48A is a written form that is required by the courts to make sure peoples' rights are not violated during traffic and pedestrian stops.

75-48 desk due to all the trained ORA's having court. Since you had previous experience working at the 75-48 desk, Lieutenant K [REDACTED] instructed D [REDACTED] M [REDACTED] to notify you that you needed to cover the 48 desk in the Operations Room until the 48 person returned from court. You started immediately complaining, responding that you were not doing it, why, is it the black male always gets picked on, that you were tired of being a black slave. You also stated that you will just "fuck it up" and it will take them, two years to figure it out. You further stated that you were going to leave at 2:00 since that is when the ORA's work is done. You were also heard ranting that "Why can't the privileged, elite, and entitled office people that work here on this half and the other half of the office get told to do it?"

CONDUCT UNBECOMING, Section 1-§025-10: (Inappropriate sexually based communication(s) conveyed in any manner)

On September 3, 2014, approximately 10:00AM, you were working in the Operations Room, filling in at the 75-48 desk, when Officer P [REDACTED] entered the room. Upon seeing Officer P [REDACTED], you stood up from the desk and asked him "Why aren't you working this desk?" Officer P [REDACTED] replied that he was never trained on the desk. You then stated everyone should be trained on the 48 desk. After Officer P [REDACTED] responded that he agreed with you, you told him that he did not do anything around here but suck off K [REDACTED] or words to that effect. When Officer P [REDACTED] asked you what you said, you repeated the statement. Your inappropriate comments were overheard by other police personnel.

The following are relevant provisions of the Philadelphia Police Department Disciplinary Code of July 2014:

1-\$016-10 Inappropriate language conduct or gestures to Police Department employees while on duty.<sup>2</sup>

1-\$025-10 On duty or job-related inappropriate sexually based communication(s) conveyed in any manner.<sup>3</sup>

On September 3, 2014, Grievant was assigned to fill-in at the 75-48 desk in the Operations Room while the officers who typically perform that function were in court. Grievant testified that he had experience processing 48s, which requires making sure they are correct and up to standard before sending them up to the detectives to be processed. Not all officers are trained to work on the 75-48 desk. Grievant said that he worked the "48 desk" for a little over an hour.

The two incidents that led the Police Department to discipline Grievant happened during the morning of September 3, 2014. The first one occurred at the beginning of the shift when Officer D [REDACTED] M [REDACTED] asked Grievant to cover the desk at Lieutenant K [REDACTED]'s request. Grievant testified that he and M [REDACTED] were good friends. When M [REDACTED] told Grievant that he needed to fill-in at the

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<sup>2</sup> The range of discipline set forth for a 1<sup>st</sup> Offense is Reprimand to 10 days.

<sup>3</sup> The range of discipline set forth for a 1<sup>st</sup> offense is Reprimand to 15 days.

75-48 desk they were in the 5 squad room, which is an open room with cubicles. Grievant said they were talking in a regular tone of voice and he said, "here we go, I'm tired of being a black slave around here." Grievant remembers that R [REDACTED] C [REDACTED] was in the 5 squad room at the time but says that he was only speaking to M [REDACTED]. J [REDACTED] A [REDACTED] was not in the 5 squad room, but Grievant said that when A [REDACTED] asked him what was going on he repeated what he had said to M [REDACTED].

The second conversation at issue took place at approximately 10:00AM when Grievant was in the operations room. Grievant and Officer P [REDACTED] had an interaction when P [REDACTED] was in the room talking to Sergeant D [REDACTED]. Grievant said they knew each other well and had a joking rapport. Grievant asked P [REDACTED] why he was not working the 75-48 desk and P [REDACTED] replied that he was not trained on the desk. According to Grievant, after a little back and forth, Grievant said P [REDACTED] "...always got your head planted firmly in Lieutenant K [REDACTED]'s lap." When Grievant was asked at the hearing if this was the first time he used foul language when talking to P [REDACTED] he said "No, it's commonplace. Commonplace." Grievant acknowledged that he was implying a sexual act. Grievant characterized the

exchange as a laughing and joking conversation at a normal volume level. Sergeant J [REDACTED] D [REDACTED], Officer T [REDACTED] M [REDACTED] and Officer V [REDACTED] H [REDACTED] were present in the operations room.

Officer M [REDACTED] P [REDACTED] testified that he worked with Grievant on and off for approximately ten years. He described his conversation with Grievant on September 3, 2014. P [REDACTED] said the conversation was initially a friendly back and forth. Then Grievant told P [REDACTED] that he does "nothing but suck K [REDACTED] off." P [REDACTED] said that he was taken aback by the comment. He asked Grievant what he had said and Grievant repeated himself. He explained that the exchange ended with Grievant asking "what is for lunch" and P [REDACTED] saying that he would grab him something. P [REDACTED] said that the officers order lunch from one place and then eat it together.

P [REDACTED] did not report his interaction with Grievant to anyone, but he provided a memorandum as requested by Lieutenant K [REDACTED]. P [REDACTED] also participated in the investigation and provided a statement to Internal Affairs.

On cross-examination P [REDACTED] acknowledged that he and Grievant would joke with each other. He said that cursing and busting chops is not uncommon in the 24<sup>th</sup> District. P [REDACTED] reiterated on cross-examination that he was taken aback by what Grievant said, but said that he was not offended.

Sergeant J [REDACTED] D [REDACTED] testified about what he witnessed between Grievant and P [REDACTED] in the Operations Room. D [REDACTED] heard Grievant refer to P [REDACTED] "giving Lieutenant K [REDACTED] head" twice. D [REDACTED] did not talk to Grievant at the time of the incident or counsel him for inappropriate behavior. D [REDACTED] said that he did not typically supervise Grievant and that he reported the incident to Lieutenant K [REDACTED] because he found Grievant's conduct inappropriate.

Lieutenant F [REDACTED] K [REDACTED] testified that he was headed out of the District for a meeting with the Police Commissioner when he learned from Sergeant D [REDACTED], who was the day work supervisor, that there was a vacancy on the 75-48 desk. K [REDACTED] said that he had two possible officers, M [REDACTED] and Grievant, available to fill-in. Since M [REDACTED] was not trained on the 75-48 desk, K [REDACTED]

asked her to tell Grievant to fill-in until the officers reported back from court.

K [REDACTED] was in the meeting when he began receiving text messages from Officers in the District that Grievant was upset about working the 75-48 desk. When K [REDACTED] returned to the District, several officers approached him to tell him about Grievant's displeasure with being told to fill-in on the 75-48 desk. He learned that Grievant was making what K [REDACTED] considered to be unprofessional and unnecessary remarks. K [REDACTED] asked the officers who approached him to draft memoranda regarding what Grievant allegedly said. When K [REDACTED] spoke to Grievant on September 3, 2014, Grievant told him that it was not his job to work the desk and that he was tired of being the black slave of the office. At the arbitration hearing, K [REDACTED] acknowledged that he received no information that Grievant failed to perform the work of the 75-48 desk when he was filling-in on September 3, 2014.

Captain D [REDACTED] O [REDACTED], the commanding officer of the 24<sup>th</sup> Police District, testified that he was at an FBI training on the date in question. O [REDACTED] explained that the investigation into the incidents included written



memoranda and interviews with officers. O [REDACTED] completed the investigation that Captain F [REDACTED] started. O [REDACTED] recommended that charges be brought against Grievant for violating the Disciplinary Code. O [REDACTED] said that he submitted the summary of the investigation and the charges that were approved by the charging unit of the Police Board of Inquiry because he believed that Grievant engaged in inappropriate conduct and inappropriate language in the work place in violation of the Disciplinary Code.

#### **EMPLOYER POSITION**

The City contends that the Department had just cause to suspend Grievant for violating two subsections of the Disciplinary Code. The City does not characterize Grievant's behavior on September 3, 2014, as part of a pattern of behavior, but as the behavior of someone who had outbursts or meltdowns because he was asked to do something that he did not want to do.

The Police Department is a paramilitary organization and there are rules and a Disciplinary Code. The City contends that Grievant knew the rules, or should have known the rules, and that his actions and words violated those

rules. The City points out that its witnesses, in their written statements and in their testimony, portrayed Grievant as someone who crossed the line. The Police Department insists that Grievant's conduct in his conversations with M [REDACTED] and with P [REDACTED] violated the Disciplinary Code and that he was appropriately suspended for three days.

#### **UNION POSITION**

The Union argues that this is a case where context matters. The Police Department is a relatively casual work environment where the environment for acceptable behavior and language is more forgiving than others. The Union acknowledges that this does not mean there is a free pass for bad behavior, but stresses that the evidence presented in this case does not indicate that Grievant engaged in conduct that rises to the level of inappropriate language conduct or gestures to Police Department employees while on duty or inappropriate sexually based communications that would subject him to penalties under 1-\$016-10 and 1-\$025-10 of the Disciplinary Code.

The Union points out that the Notice of Suspension is the City's chance to provide adequate notice to the individual as to what he is charged with, thus the specific references to the disciplinary code, and what conduct constitutes the violation. The Union stresses that the two charges in this case -- an inappropriate language conduct or gestures to police department employees while on duty and inappropriately sexual based communication conveyed in any manner -- each involve a specific set of facts. The first charge is linked to Grievant's conversation with M [REDACTED] and the second charge to his conversation with P [REDACTED]. The Union argues that the City is not permitted to apply different facts to different charges at this late stage in the grievance process. According to the Union, nearly all the facts provided by the City apply to the conversation Grievant had with P [REDACTED]. It is unfair at the hearing to attempt to use those facts as support for the discipline issued as a result of his conversation with M [REDACTED].

The Union asserts that the City failed to present any witnesses to what took place in Grievant's conversation with M [REDACTED], which is the first charge. Grievant testified that he was speaking with his friend about an

assignment he had just received. Grievant has the right to communicate those feelings to a colleague. The Union maintains that even though Grievant's views may have been provocative, they were not expressed in an official capacity or an obscene manner, and they were not expressed in a way that would disrupt the 5 squad room.

The Union further argues that the City did not meet its burden on the second charge. Grievant and P [REDACTED] had worked together for many years and were friendly. Moreover, it was commonplace to use inappropriate language at the 24<sup>th</sup> District. Most notably, the Union points out that P [REDACTED] was taken aback, but was not offended.

The Union says that the type of inappropriate sexually based communication that is intended to be addressed by Section 1-§025-10 of the Code is more akin to sexual harassment, and that sort of behavior did not take place during Grievant's conversation with P [REDACTED]. The Union compares Grievant's conduct to an acceptable form of locker room talk. Grievant's comments may have been sarcastic, silly and stupid, but nevertheless they were appropriate based upon the circumstances and the context.

The Union contends that the three-day suspension was given to Grievant as a culmination of two separate charges. Therefore, if just cause is not found to support both charges, the same penalty should not hold.

### **FINDINGS**

The issue to be decided is: Whether there was just cause to suspend Grievant for three days, and, if not, what shall be the remedy?

A determination as to whether there was just cause for an employee's discipline must be made on a case-by-case basis, considering the relevant facts and circumstances which pertain in each case. The initial inquiry is whether the evidence here establishes that Grievant committed the violations to the Disciplinary Code which led to his three-day suspension.

The Notice of Suspension cites two separate violations of the Disciplinary Code. First, the City indicates that Grievant violated 1-\$016-10 for his conduct during his conversation with Officer M [REDACTED] on September 3, 2014. Grievant acknowledged in his testimony that while

he was talking to M [REDACTED], whom he considers to be a friend, he complained about being assigned to the 75-48 desk.

Grievant was clearly frustrated when he was asked to work the 75-48 desk. However, despite his frustration there is no evidence to suggest that he failed to perform the work required of him while he was filling in. There is no evidence -- and no claim -- that he was insubordinate when he complained about his assignment to M [REDACTED]. They were peers, having a private conversation, using normal tones of voice. Nor is there evidence that Grievant left his assignment before the other officers returned from court or that he failed to perform his duties while he was at the 75-48 desk.

Moreover, it is the City's burden to establish that there was just cause for Grievant's discipline, and there is nothing in the record to indicate that M [REDACTED] found this conversation, including Grievant's language, inappropriate. M [REDACTED] did not testify, and there also is no evidence which establishes that anyone who overheard the conversation reasonably was offended or found it to be inappropriate. The only direct testimony at hearing was

Grievant's description of his conversation with M [REDACTED]. It is not uncommon for peers at work to discuss their work assignments and to at times complain about those work assignments, and Grievant acknowledged that he made such complaints to M [REDACTED]. Grievant may have shown better judgment had he toned down his complaints, but I do not find that his language or manner during his conversation with M [REDACTED] constituted a violation of 1-\$016-10 of the Disciplinary Code.

Second, the City states that Grievant violated 1-\$025-10 based on the conversation he had with Officer P [REDACTED] at approximately 10:00AM. There is no dispute that Grievant, in the presence of Sergeant D [REDACTED], said something to P [REDACTED] about oral sex. P [REDACTED] testified that Grievant said "I [P [REDACTED]] do nothing but suck K [REDACTED] off." Grievant testified that he said "...you always got your head planted firmly in Lieutenant K [REDACTED]'s lap." Grievant then repeated the comment referring to oral sex when P [REDACTED], taken aback by what he heard, asked Grievant what he had said.

Although the Police Department may be considered a casual work environment and employees may engage in some


loose banter, Sergeant D [REDACTED] clearly found Grievant's comments offensive. He did not typically supervise Grievant. There is no evidence that he was motivated to report Grievant's behavior for any reason other than he found the repeated comment about oral sex offensive. P [REDACTED] said he was not offended, but was taken aback. The Union argues that this one conversation does not fall within the behavior intended to be addressed by 1-§025-10. However, this was not just an instance of someone cursing or using crude language. Here, Grievant, because he was annoyed about a job assignment, repeatedly alluded to a colleague having oral sex with a superior officer. Grievant made these insulting comments in front of several people.

I find that a reasonable person in Sergeant D [REDACTED]'s position would have been offended by Grievant's comments, as D [REDACTED] was. On the whole of the evidence, I find that these comments, even on a single occasion, subjected Grievant to discipline under 1-§025-10 of the Disciplinary Code. Under all relevant facts and circumstances, including the need to impress upon Grievant the inappropriateness of his comments, I find that a one-day suspension was warranted.



**AWARD**

The grievance is sustained in part and denied in part. The City did not have just cause to discipline Grievant for violation of 1-§016-10 of the Disciplinary Code but did have just cause to discipline Grievant for violation of 1-§025-10 of the Disciplinary Code. For the reasons set forth above, the three-day suspension issued to Grievant is reduced to a one-day suspension, and he shall be reimbursed for two days' pay. I retain jurisdiction for six months to resolve any dispute relating to the remedy provided by this Award that the parties are unable to resolve.

  
Samantha E. Tower, Esq.  
Arbitrator  
April 14, 2017